

## SUBTITLE B - MARITIME SECURITY FLEET PROGRAM<sup>17</sup>

### ESTABLISHMENT OF FLEET

#### SEC. 651. ESTABLISHMENT OF FLEET<sup>18</sup> (46 App. U.S.C. 1187 (1996)).

(a) **In General.** The Secretary of Transportation shall establish a fleet of active, militarily useful, privately-owned vessels to meet national defense and other security requirements and maintain a United States presence in international commercial shipping. The Fleet shall consist of privately owned, United States-flag vessels for which there are in effect operating agreements under this subtitle, and shall be known as the Maritime Security Fleet.

(b) **Vessel Eligibility.** A vessel is eligible to be included in the Fleet if the vessel is self-propelled and—

(1)(A) is operated by a person as an ocean common carrier;

(B) whether in commercial service, on charter to the Department of Defense, or in other employment, is either—

(i) a roll-on/roll-off vessel with a carrying capacity of at least 80,000 square feet or 500 twenty-foot equivalent units; or

(ii) a lighter aboard ship vessel with a barge capacity of at least 75 barges; or

(C) any other type of vessel that is determined by the Secretary to be suitable for use by the United States for national defense or military purposes in time of war or national emergency;

(2)(A)(i) is a United States-documented vessel; and

(ii) on the date an operating agreement covering the vessel is entered into under this subtitle, is—

(I) a LASH vessel that is 25 years of age or less; or

---

<sup>17</sup> Public Law 104-239, approved October 8, 1996 (104 STAT. 3118), the Maritime Security Act of 1996, added Subtitle B to Title VI of the Merchant Marine Act, 1936, and made comprehensive amendments to the Act and other provisions of law. Section 8 of Public Law 104-239, provides:

“(a) **In General.** The Secretary of Transportation may prescribe rules as necessary to carry out this Act and the amendments made by this Act.

“(b) **Interim Rules.**—The Secretary of Transportation may prescribe interim rules necessary to carry out this Act and the amendments made by this Act. For this purpose, the Secretary of Transportation is excepted from compliance with the notice and comment requirements of section 553 of title 5, United States Code. All rules prescribed under the authority of this subsection that are not earlier superseded by final rules shall expire not later than 270 days after the date of enactment of this Act.”

<sup>18</sup> Note the provisions of law appearing at the end of Section 651 that affect the establishment of the Maritime Security Fleet.

(II) any other type of vessel that is 15 years of age or less; except that the Secretary of Transportation may waive the application of clause (ii) if the Secretary, in consultation with the Secretary of Defense, determines that the waiver is in the national interest; or

(B) it is not a United States-documented vessel, but the owner of the vessel has demonstrated an intent to have the vessel documented under chapter 121 of title 46, United States Code, if it is included in the Fleet, and the vessel will be less than 10 years of age on the date of that documentation;

(3) the Secretary of Transportation determines that the vessel is necessary to maintain United States presence in international commercial shipping or, after consultation with the Secretary of Defense, determines that the vessel is militarily useful for meeting the sealift needs of the United States with respect to national emergencies; and

(4) at the time an operating agreement for the vessel is entered into under this subtitle, the vessel will be eligible for documentation under chapter 121 of title 46, United States Code.

\* \* \* \* \*

## **PROVISIONS OF LAW THAT AFFECT THE MARITIME SECURITY PROGRAM**

Section 1136(c) and (d) and Section 1137 of Public Law 104 -324, approved October 19, 1997 (110 STAT. 3987) provide:

**Sec. 1136 (c). Trust Charterers.**—Notwithstanding section 12102(d)(4) of title 46, United States Code, as amended by this section, for purposes of subtitle B of title VI of the Merchant Marine Act, 1936 a vessel is deemed to be owned and operated by a citizen of the United States (as that term is used in that subtitle) if—

(1) the person chartering the vessel from a trust under section 12102(d)(2) of that title is a citizen of the United States under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802); and

(2)(A) the vessel—

(i) is delivered by a shipbuilder, following completion of construction, on or after May 1, 1995 and before January 31, 1996; or

(ii) is owned by a citizen of the United States under section 2 of the Shipping Act, 1916 on September 1, 1996, or is a replacement for such a vessel; or

(B) payments have been made with respect to the vessel under subtitle B of title VI of the Merchant Marine Act, 1936 for at least 1 year.

**Sec. 1136 (d). Indirect Vessel Owners.**—Notwithstanding any other provision of law, for purposes of subtitle B of title VI of the Merchant Marine Act, 1936 the following vessels are deemed to be owned and operated by a citizen of the United States (as that term is used in that subtitle) if the vessels are owned, directly or indirectly, by a person that is a citizen of the United States under section 2 of the Shipping Act, 1916 (46 App. U.S.C. 802):

(1) Any vessel constructed under a shipbuilding contract signed on December 21, 1995, and having hull number 3077, 3078, 3079, or 3080.

(2) Any vessel delivered by a shipbuilder, following completion of construction, on or after May 1, 1995, and before January 31, 1996.

(3) Any vessel owned on September 1, 1996, by a person that is a citizen of the United States under section 2 of the Shipping Act, 1916, or a replacement for such a vessel.

(4) Any vessel with respect to which payments have been made under subtitle B of title VI of the Merchant Marine Act, 1936 for at least 1 year.

**Sec. 1137. Vessel Standards.**

(a) **Certificate of Inspection.**—A vessel used to provide transportation service as a common carrier which the Secretary of Transportation determines meets the criteria of section 651(b) of the Merchant Marine Act, 1936, but which on the date of enactment of this Act is not a documented vessel (as that term is defined in section 2101 of title 46, United States Code), shall be eligible for a certificate of inspection if the Secretary determines that—

(1) the vessel is classed by and designed in accordance with the rules of the American Bureau of Shipping or another classification society accepted by the Secretary;

(2) the vessel complies with applicable international agreements and associated guidelines, as determined by the country in which the vessel was documented immediately before becoming a documented vessel (as defined in that section); and

(3) that country has not been identified by the Secretary as inadequately enforcing international vessel regulations as to that vessel.

(b) **Continued Eligibility for Certificate.**—Subsection (a) does not apply to a vessel after any date on which the vessel fails to comply with the applicable international agreements and associated guidelines referred to in subsection (a)(2).

(c) **Reliance on Classification Society.**—

(1) **In General.**—The Secretary may rely on a certification from the American Bureau of Shipping or, subject to paragraph (2), another classification society accepted by the Secretary to establish that a vessel is in compliance with the requirements of subsections (a) and (b).

(2) **Foreign Classification Society.**—The Secretary may accept certification from a foreign classification society under paragraph (1) only—

(A) to the extent that the government of the foreign country in which the society is headquartered provides access on a reciprocal basis to the American Bureau of Shipping; and

(B) if the foreign classification society has offices and maintains records in the United States.

\* \* \* \* \*

## CONTINUATION OF THE MERCHANT MARINE ACT, 1936

### SEC. 652. OPERATING AGREEMENTS (46 App. U.S.C. 1187a (1996)).

(a) **In General.** The Secretary of Transportation shall require, as a condition of including any vessel in the Fleet, that the owner or operator of the vessel enter into an operating agreement with the Secretary under this section. Notwithstanding subsection (g), the Secretary may enter into an operating agreement for, among other vessels that are eligible to be included in the Fleet, any vessel which continues to operate under an operating-differential subsidy contract under subtitle A or which is under charter to the Department of Defense.

(b) **Requirements for Operation.** An operating agreement under this section shall require that, during the period a vessel is operating under the agreement—

(1) the vessel—

(A) shall be operated exclusively in the foreign trade or in mixed foreign and domestic trade allowed under a registry endorsement issued under section 12105 of title 46, United States Code, and

(B) shall not otherwise be operated in the coastwise trade; and

(2) the vessel shall be documented under chapter 121 of title 46, United States Code.

(c) **Regulatory Relief.** A contractor of a vessel included in an operating agreement under this subtitle may operate the vessel in the foreign commerce of the United States without restriction, and shall not be subject to any requirement under section 801, 808, 809, or 810. Participation in the program established by this subtitle shall not subject a contractor to section 805 or to any provision of subtitle A.

(d) **Effectiveness and Annual Payment Requirements of Operating Agreements.**

(1) **Effectiveness.** The Secretary of Transportation may enter into an operating agreement under this subtitle for fiscal year 1996. The agree-

ment shall be effective only for 1 fiscal year, but shall be renewable, subject to the availability of appropriations, for each subsequent fiscal year through the end of fiscal year 2005.

(2) **Annual Payment.** An operating agreement under this subtitle shall require, subject to the availability of appropriations and the other provisions of this section, that the Secretary of Transportation pay each fiscal year to the contractor, for each vessel that is covered by the operating agreement, an amount equal to \$2,300,000 for fiscal year 1996 and \$2,100,000 for each fiscal year thereafter in which the agreement is in effect. The amount shall be paid in equal monthly installments at the end of each month. The amount shall not be reduced except as provided by this section.

(e) **Certification Required for Payment.** As a condition of receiving payment under this section for a fiscal year for a vessel, the contractor for the vessel shall certify, in accordance with regulations issued by the Secretary of Transportation, that the vessel has been and will be operated in accordance with subsection (b)(1) for at least 320 days in the fiscal year. Days during which the vessel is drydocked, surveyed, inspected, or repaired shall be considered days of operation for purposes of this subsection.

(f) **Operating Agreement is Obligation of United States Government.** An operating agreement under this subtitle constitutes a contractual obligation of the United States Government to pay the amounts provided for in the agreement to the extent of actual appropriations.

(g) **Limitations.** The Secretary of Transportation shall not make any payment under this subtitle for a vessel with respect to any days for which the vessel is—

(1) subject to an operating-differential subsidy contract under subtitle A or under a charter to the United States Government, other than a charter pursuant to section 653;

(2) not operated or maintained in accordance with an operating agreement under this subtitle; or

(3) more than 25 years of age, except that the Secretary may make such payments for a LASH vessel for any day for which the vessel is more than 25 years of age if that vessel—

(A) is modernized after January 1, 1994,

(B) is modernized before it is 25 years of age, and

(C) is not more than 30 years of age.

(h) **Payments.** With respect to payments under this subtitle for a vessel covered by an operating agreement, the Secretary of Transportation—

(1) except as provided in paragraph (2), shall not reduce any payment for the operation of a vessel to carry military or other preference cargoes under section 2631 of title 10, United States Code, the Act of March 26, 1934 (46 U.S.C. App. 1241-1), section 901(a), 901(b), or 901b of this Act, or any other cargo preference law of the United States;

(2) shall not make any payment for any day that a vessel is engaged in transporting more than 7,500 tons of civilian bulk preference cargoes pursuant to section 901(a), 901(b), or 901b that is bulk cargo; and

(3) shall make a pro rata reduction in payment for each day less than 320 in a fiscal year that a vessel covered by an operating agreement is not operated in accordance with subsection (b)(1), with days during which the vessel is drydocked or undergoing survey, inspection, or repair considered to be days on which the vessel is operated.

(i) **Priority for Awarding Agreements.** Subject to the availability of appropriations, the Secretary shall enter into operating agreements according to the following priority:

(1) *Vessels Owned by Citizens.*

(A) *Priority.*—First, for any vessel that is—

(i) owned and operated by persons who are citizens of the United States under section 2 of the Shipping Act, 1916;<sup>19</sup> or

(ii) less than 10 years of age and owned and operated by a corporation that is—

(I) eligible to document a vessel under chapter 121 of title 46, United States Code; and

(II) affiliated with a corporation operating or managing for the Secretary of Defense other vessels documented under that chapter, or chartering other vessels to the Secretary of Defense.

(B) *Limitation on Number of Operating Agreements.*—The total number of operating agreements that may be entered into by a person under the priority in subparagraph (A)—

(i) for vessels described in subparagraph (A)(i), may not exceed the sum of—

(I) the number of United States-documented vessels the person operated in the foreign commerce of the United States (except mixed coastwise and foreign commerce) on May 17, 1995; and

(II) the number of United States-documented vessels the person chartered to the Secretary of Defense on that date; and

---

<sup>19</sup> Note the various exceptions to this requirement set forth in the provisions of law following Section 2 of the Shipping Act, 1916, page 286, *infra*.

(ii) for vessels described in subparagraph (A)(ii), may not exceed 5 vessels.

(C) *Treatment of Related Parties.*—For purposes of subparagraph (B), a related party with respect to a person shall be treated as the person.

(2) ***Other Vessels Owned by Citizens and Government Contractors.*** To the extent that amounts are available after applying paragraph (1), any vessel that is owned and operated by a person who is—

(A) a citizen of the United States under section 2 of the Shipping Act, 1916<sup>20</sup>, that has not been awarded an operating agreement under the priority established under paragraph (1); or

(B)(i) eligible to document a vessel under chapter 121 of title 46, United States Code; and

(ii) affiliated with a corporation operating or managing other United States-documented vessels for the Secretary of Defense or chartering other vessels to the Secretary of Defense.

(3) ***Other Vessels.*** To the extent that amounts are available after applying paragraphs (1) and (2), any other eligible vessel.

(j) **Transfer of Operating Agreements.** A contractor under an operating agreement may transfer the agreement (including all rights and obligations under the agreement) to any person eligible to enter into that operating agreement under this subtitle after notification of the Secretary in accordance with regulations prescribed by the Secretary, unless the transfer is disapproved by the Secretary within 90 days after the date of that notification. A person to whom an operating agreement is transferred may receive payments from the Secretary under the agreement only if each vessel to be covered by the agreement after the transfer is an eligible vessel under section 651(b).

(k) **Reversion of Unused Authority.** The obligation of the Secretary to make payments under an operating agreement under this subtitle shall terminate with respect to a vessel if the contractor fails to engage in operation of the vessel for which such payment is required—

(1) within one year after the effective date of the operating agreement, in the case of a vessel in existence on the effective date of the agreement, or

(2) within 30 months after the effective date of the operating agreement, in the case of a vessel to be constructed after that effective date.

(l) **Procedure for Considering Application; Effective Date for Certain Vessels.**

(1) ***Procedures.*** No later than 30 days after the date of the enactment of the Maritime Security Act of 1996, the Secretary shall accept applica-

---

<sup>20</sup> See footnote 19, *supra*.

tions for enrollment of vessels in the Fleet, and within 90 days after receipt of an application for enrollment of a vessel in the Fleet, the Secretary shall enter into an operating agreement with the applicant or provide in writing the reason for denial of that application.

(2) **Effective Date.** Unless an earlier date is requested by the applicant, the effective date for an operating agreement with respect to a vessel which is, on the date of entry into an operating agreement, either subject to a contract under subtitle A or on charter to the United States Government, other than a charter under section 653, shall be the expiration or termination date of the contract under subtitle A or of the Government charter covering the vessel, respectively, or any earlier date the vessel is withdrawn from that contract or charter.

(m) **Early Termination.** An operating agreement under this subtitle shall terminate on a date specified by the contractor if the contractor notifies the Secretary, by not later than 60 days before the effective date of the termination, that the contractor intends to terminate the agreement. Vessels covered by an operating agreement terminated under this subsection shall remain documented under chapter 121 of title 46, United States Code, until the date the operating agreement would have terminated according to its terms. A contractor who terminates an operating agreement pursuant to this subsection shall continue to be bound by the provisions of section 653 until the date the operating agreement would have terminated according to its terms. All terms and conditions of an Emergency Preparedness Agreement entered into under section 653 shall remain in effect until the date the operating agreement would have terminated according to its terms, except that the terms of such Emergency Preparedness Agreement may be modified by the mutual consent of the contractor and the Secretary of Transportation and the Secretary of Defense.

(n) **Nonrenewal for Lack of Funds.** If, by the first day of a fiscal year, sufficient funds have not been appropriated under the authority provided by section 655 for that fiscal year, the Secretary of Transportation shall notify the Congress that operating agreements authorized under this subtitle for which sufficient funds are not available will not be renewed for that fiscal year if sufficient funds are not appropriated by the 60th day of that fiscal year. If funds are not appropriated under the authority provided by section 655 for any fiscal year by the 60th day of that fiscal year, then each vessel covered by an operating agreement under this subtitle for which funds are not available is thereby released from any further obligation under the operating agreement, and the vessel owner or operator may transfer and register such vessel under a foreign registry deemed acceptable by the Secretary of Transportation, notwithstanding any other provision of law. If section



902 is applicable to such vessel after registration of the vessel under such a registry, the vessel is available to be requisitioned by the Secretary of Transportation pursuant to section 902.

**(o) Award of Operating Agreements.—**

(1) ***In General.*** The Secretary of Transportation, subject to paragraph (4), shall award operating agreements within each priority under subsection (i) (1), (2), and (3) under regulations prescribed by the Secretary.

(2) ***Number of Agreements Awarded.*** Regulations under paragraph (1) shall provide that if appropriated amounts are not sufficient for operating agreements for all vessels within a priority under subsection (i) (1), (2), or (3), the Secretary shall award to each person submitting a request a number of operating agreements that bears approximately the same ratio to the total number of vessels in the priority, as the amount of appropriations available for operating agreements for vessels in the priority bears to the amount of appropriations necessary for operating agreements for all vessels in the priority.

(3) ***Treatment of Related Parties.*** For purposes of paragraph (2), a related party with respect to a person shall be treated as the person.

(4) ***Preference for United States-Built Vessels.*** In awarding operating agreements for vessels within a priority under subsection (i) (1), (2), or (3), the Secretary shall give preference to a vessel that was constructed in the United States, to the extent such preference is consistent with establishment of a fleet described in the first sentence of section 651(a) (taking into account the age of the vessel, the nature of service provided by the vessel, and the commercial viability of the vessel).

(p) ***Notice to United States Shipbuilders Required.*** The Secretary shall include in any operating agreement under this subtitle a requirement that the contractor under the agreement shall, by not later than 30 days after soliciting any bid or offer for the construction of any vessel in a foreign shipyard and before entering into a contract for construction of a vessel in a foreign shipyard, provide notice of the intent of the contractor to enter into such a contract to each shipyard in the United States that is capable of constructing the vessel.

## **NATIONAL SECURITY REQUIREMENTS**

### **SEC. 653. EMERGENCY PREPAREDNESS AGREEMENT (46 App. U.S.C. 1187b (1996)).**

(1) ***Requirement to Enter Agreement.*** The Secretary of Transportation shall establish an Emergency Preparedness Program under this section that is approved by the Secretary of Defense. Under the program, the Secretary of Transportation shall include in each operating agree-

ment under this subtitle a requirement that the contractor enter into an Emergency Preparedness Agreement under this section with the Secretary. The Secretary shall negotiate and enter into an Emergency Preparedness Agreement with each contractor as promptly as practicable after the contractor has entered into an operating agreement under this subtitle.

(2) **Terms of Agreement.** An Emergency Preparedness Agreement under this section shall require that upon a request by the Secretary of Defense during time of war or national emergency, or whenever determined by the Secretary of Defense to be necessary for national security (including any natural disaster, international peace operation, or contingency operation (as that term is defined in section 101 of title 10, United States Code)), a contractor for a vessel covered by an operating agreement under this subtitle shall make available commercial transportation resources (including services). The basic terms of the Emergency Preparedness Agreements shall be established pursuant to consultations among the Secretary, the Secretary of Defense, and Maritime Security Program contractors. In any Emergency Preparedness Agreement, the Secretary and a contractor may agree to additional or modifying terms appropriate to the contractor's circumstances if those terms have been approved by the Secretary of Defense.

(3) **Participation After Expiration of Operating Agreement.** Except as provided by section 652(m), the Secretary may not require, through an Emergency Preparedness Agreement or operating agreement, that a contractor continue to participate in an Emergency Preparedness Agreement when the operating agreement with the contractor has expired according to its terms or is otherwise no longer in effect. After expiration of an Emergency Preparedness Agreement, a contractor may volunteer to continue to participate in such an agreement.

(b) **Resources Made Available.** The commercial transportation resources to be made available under an Emergency Preparedness Agreement shall include vessels or capacity in vessels, intermodal systems and equipment, terminal facilities, intermodal and management services, and other related services, or any agreed portion of such non-vessel resources for activation as the Secretary may determine to be necessary, seeking to minimize disruption of the contractor's service to commercial shippers.

(c) **Compensation.—**

(1) **In General.** The Secretary of Transportation shall provide in each Emergency Preparedness Agreement for fair and reasonable compensation for all commercial transportation resources provided pursuant to this section.

(2) ***Specific Requirements.*** Compensation under this subsection—

(A) shall not be less than the contractor's commercial market charges for like transportation resources;

(B) shall include all the contractor's costs associated with provision and use of the contractor's commercial resources to meet emergency requirements;

(C) in the case of a charter of an entire vessel, shall be fair and reasonable;

(D) shall be in addition to and shall not in any way reflect amounts payable under section 652; and

(E) shall be provided from the time that a vessel or resource is diverted from commercial service until the time that it reenters commercial service.

(3) ***Approval of Amount by Secretary of Defense.*** No compensation may be provided for a vessel under this subsection unless the amount of the compensation is approved by the Secretary of Defense.

(d) **Temporary Replacement Vessels.** Notwithstanding any other provision of this subtitle or of other law to the contrary—

(1) a contractor may operate or employ in foreign commerce a foreign-flag vessel or foreign-flag vessel capacity, as a temporary replacement for a United States-documented vessel or United States-documented vessel capacity that is activated under an Emergency Preparedness Agreement; and

(2) such replacement vessel or vessel capacity shall be eligible during the replacement period to transport preference cargoes subject to section 2631 of title 10, United States Code, the Act of March 26, 1934 (46 U.S.C. App. 1241-1), and sections 901(a), 901(b), and 901b of this Act to the same extent as the eligibility of the vessel or vessel capacity replaced.

(e) **Redelivery and Liability of United States for Damages.—**

(1) ***In General.*** All commercial transportation resources activated under an Emergency Preparedness Agreement shall, upon termination of the period of activation, be redelivered to the contractor in the same good order and condition as when received, less ordinary wear and tear, or the Government shall fully compensate the contractor for any necessary repair or replacement.

(2) ***Limitation on Liability of United States.*** Except as may be expressly agreed to in an Emergency Preparedness Agreement, or as otherwise provided by law, the Government shall not be liable for disruption of a contractor's commercial business or other consequential damages to a contractor arising from activation of commercial transportation resources under an Emergency Preparedness Agreement.

(3) ***Limitation on Application of Other Requirements.*** Sections 902 and 909 of this Act shall not apply to a vessel while it is covered by an Emergency Preparedness Agreement under this subtitle. Any Emergency Preparedness Agreement entered into by a contractor shall supersede any other agreement between that contractor and the Government for vessel availability in time of war or national emergency.

**SEC. 654. DEFINITIONS (46 App. U.S.C. 1187c (1996)).** In this subtitle:

(1) ***Bulk Cargo.*** The term “bulk cargo” means cargo that is loaded and carried in bulk without mark or count.

(2) ***Contractor.*** The term “contractor” means an owner or operator of a vessel that enters into an operating agreement for the vessel with the Secretary of Transportation under section 652.

(3) ***Ocean Common Carrier.*** The term “ocean common carrier” means a person holding itself out to the general public to operate vessels to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation, that—

(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker. As used in this paragraph, “chemical parcel-tanker” means a vessel whose cargo-carrying capability consists of individual cargo tanks for bulk chemicals that are a permanent part of the vessel, that have segregation capability with piping systems to permit simultaneous carriage of several bulk chemical cargoes with minimum risk of cross-contamination, and that has a valid certificate of fitness under the International Maritime Organization Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk.

(4) ***Fleet.*** The term “Fleet” means the Maritime Security Fleet established pursuant to section 651(a).

(5) ***LASH Vessel.*** The term “LASH vessel” means a lighter aboard ship vessel.

(6) ***United States-Documented Vessel.*** The term “United States-documented vessel” means a vessel documented under chapter 121 of title 46, United States Code.

**SEC. 655. AUTHORIZATION OF APPROPRIATIONS (46 App. U.S.C. 1187d (1996)).**

There are authorized to be appropriated for operating agreements under this subtitle, to remain available until expended, \$100,000,000 for fiscal year 1996 and such sums as may be necessary, not to exceed \$100,000,000, for each fiscal year thereafter through fiscal year 2005.

**SEC. 656. NONCONTIGUOUS DOMESTIC TRADES (46 App. U.S.C. 1187e (1996)).**

(a) (1) Except as otherwise provided in this section, no contractor or related party shall receive payments pursuant to this subtitle during a period when it participates in a noncontiguous domestic trade, except upon written permission of the Secretary of Transportation. Such written permission shall also be required for any material change in the number or frequency of sailings, the capacity offered, or the domestic ports called by a contractor or related party in a noncontiguous domestic trade. The Secretary may grant such written permission pursuant to written application of such contractor or related party unless the Secretary finds that—

(A) existing service in that trade is adequate; or

(B) the service sought to be provided by the contractor or related party—

(i) would result in unfair competition to any other person operating vessels in such noncontiguous domestic trade, or

(ii) would be contrary to the objects and policy of this Act.

(2) For purposes of this subsection, written permission of the Secretary means permission which states the capacity offered, the number and frequency of sailings, and the domestic ports called, and which is granted following—

(A) written application containing the information required by paragraph (e)(1) by a person seeking such written permission, notice of which application shall be published in the Federal Register within 15 days of filing of such application with the Secretary;

(B) holding of a hearing on the application under section 554 of title 5, United States Code, in which every person, firm or corporation having any interest in the application shall be permitted to intervene and be heard; and

(C) final decision on the application by the Secretary within 120 days following conclusion of such hearing.

(b) Subsection (a) shall not apply in any way to provision by a contractor of service within the level of service provided by that contractor as of the date established by subsection (c) or to provision of service permitted by subsection (d).

(c) The date referred to in subsection (b) shall be August 9, 1995: Provided however, That with respect to tug and barge service to Alaska the date referred to in subsection (b) shall be July 1, 1992.

(d) A contractor may provide service in a trade in addition to the level of service provided as of the applicable date established by subsection (c) in proportion to the annual increase in real gross product of the non-contiguous State or Commonwealth served since the applicable date established by subsection (c).

(e)(1) A person applying for award of an agreement under this subtitle shall include with the application a description of the level of service provided by that person in each noncontiguous domestic trade served as of the date applicable under subsection (c). The application also shall include, for each such noncontiguous domestic trade: a list of vessels operated by that person in such trade, their container carrying capacity expressed in twenty-foot equivalent units (TEUs) or other carrying capacity, the itinerary for each such vessel, and such other information as the Secretary may require by regulation. Such description and information shall be made available to the public. Within 15 days of the date of an application for an agreement by a person seeking to provide service pursuant to subsections (b) and (c) of this section, the Secretary shall cause to be published in the Federal Register notice of such description, along with a request for public comment thereon. Comments on such description shall be submitted to the Secretary within 30 days of publication in the Federal Register. Within 15 days after receipt of comments, the Secretary shall issue a determination in writing either accepting, in whole or part, or rejecting use of the applicant's description to establish the level of service provided as of the date applicable under subsection (c): Provided, That notwithstanding the provisions of this subsection, processing of the application for an award of an agreement shall not be suspended or delayed during the time in which comments may be submitted with respect to the determination or during the time prior to issuance by the Secretary of the required determination: Provided further, That if the Secretary does not make the determination required by this paragraph within the time provided by this paragraph, the description of the level of service provided by the applicant shall be deemed to be the level of service provided as of the applicable date until such time as the Secretary makes the determination.

(2) No contractor shall implement the authority granted in subsection (d) of this section except as follows:

(A) An application shall be filed with the Secretary which shall state the increase in capacity sought to be offered, a description of the means by which such additional capacity would be provided, the basis for applicant's position that such increase in capacity would be in pro-

portion to or less than the increase in real gross product of the relevant noncontiguous State or Commonwealth since the applicable date established by subsection (c), and such information as the Secretary may require so that the Secretary may accurately determine such increase in real gross product of the relevant noncontiguous State or Commonwealth.

(B) Such increase in capacity sought by applicant and such information shall be made available to the public.

(C) Within 15 days of the date of an application pursuant to this paragraph the Secretary shall cause to be published in the Federal Register notice of such application, along with a request for public comment thereon.

(D) Comments on such application shall be submitted to the Secretary within 30 days of publication in the Federal Register.

(E) Within 15 days after receipt of comments, the Secretary shall issue a determination in writing either accepting, in whole or part, or rejecting, the increase in capacity sought by the applicant as being in proportion to or less than the increase in real gross product of the relevant noncontiguous State or Commonwealth since the applicable date established by subsection (c): Provided, That, notwithstanding the provisions of this section, if the Secretary does not make the determination required by this paragraph within the time provided by this paragraph, the increase in capacity sought by applicant shall be permitted as being in proportion to or less than such increase in real gross product until such time as the Secretary makes the determination.

(f) With respect to provision by a contractor of service in a noncontiguous domestic trade not authorized by this section, the Secretary shall deny payments under the operating agreement with respect to the period of provision of such service but shall deny payments only in part if the extent of provision of such unauthorized service was de minimis or not material.

(g) Notwithstanding any other provision of this subtitle, the Secretary may issue temporary permission for any United States citizen, as that term is defined in section 2 of the Shipping Act, 1916, to provide service to a noncontiguous State or Commonwealth upon the request of the Governor of such noncontiguous State or Commonwealth, in circumstances where an Act of God, a declaration of war or national emergency, or any other condition occurs that prevents ocean transportation service to such noncontiguous State or Commonwealth from being provided by persons currently providing such service. Such temporary permission shall expire 90 days from date of grant, unless extended by the Secretary upon written request of the Governor of such State or Commonwealth.

(h) As used in this section:

(1) The term “level of service provided by a contractor” in a trade as of a date means—

(A) with respect to service other than service described in (B), the total annual capacity provided by the contractor in that trade for the 12 calendar months preceding that date: Provided, That, with respect to unscheduled, contract carrier tug and barge service between points in Alaska south of the Arctic Circle and points in the contiguous 48 States, the level of service provided by a contractor shall include 100 percent of the capacity of the equipment dedicated to such service on the date specified in subsection (c) and actually utilized in that service in the two-year period preceding that date, excluding service to points between Anchorage, Alaska and Whittier, Alaska, served by common carrier service unless such unscheduled service is only for carriage of oil or pursuant to a contract with the United States military: Provided further, That, with respect to scheduled barge service between the contiguous 48 States and Puerto Rico, such total annual capacity shall be deemed as such total annual capacity plus the annual capacity of two additional barges, each capable of carrying 185 trailers and 100 automobiles; and

(B) with respect to service provided by container vessels, the overall capacity equal to the sum of—

(i) 100 percent of the capacity of vessels operated by or for the contractor on that date, with the vessels’ configuration and frequency of sailing in effect on that date, and which participate solely in that noncontiguous domestic trade; and

(ii) 75 percent of the capacity of vessels operated by or for the contractor on that date, with the vessels’ configuration and frequency of sailing in effect on that date, and which participate in that noncontiguous domestic trade and in another trade, provided that the term does not include any restriction on frequency, or number of sailings, or on ports called within such overall capacity.

(2) The level of service set forth in paragraph (1) shall be described with the specificity required by subsection (e)(1) and shall be the level of service in a trade with respect to the applicable date established by subsection (c) only if the service is not abandoned thereafter, except for interruptions due to military contingency or other events beyond the contractor’s control.

(3) The term “participates in a noncontiguous domestic trade” means directly or indirectly owns, charters, or operates a vessel engaged in transportation of cargo between a point in the contiguous 48 states and a point in Alaska, Hawaii, or Puerto Rico, other than a point in Alaska north of the Arctic Circle.



(4) The term “related party” means—

(A) a holding company, subsidiary, affiliate, or associate of a contractor who is a party to an operating agreement under this subtitle; and

(B) an officer, director, agent, or other executive of a contractor or of a person referred to in subparagraph (A).